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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

STATE OF ALABAMA, PETITIONER

VS.

EARNEST JAMES STURDIVANT, RESPONDENT

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

GERRILYN V. GRANT
ASSISTANT ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Does the rule of Strickland v. Washington (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ [1984]) apply to the effective assistance of counsel on appeal?

2. Does an attorney deprive his client of effective assistance of counsel on appeal when, as a result of his understanding of the client's intentions, the attorney does not appeal his client's conviction?

3. Is an attorney shown to have deprived his client of effective assistance of counsel on appeal in not appealing the client's conviction, where the undisputed evidence is that such an appeal would have been frivolous?

THE PARTIES

In the Circuit Court of Dallas County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Petitioner herein and Earnest James Sturdivant, who is Respondent herein.

The matters at issue here were first raised in the Circuit Court of Dallas County, Alabama, by Respondent's petition for a writ of error coram nobis and have been at issue throughout these proceedings.

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OPINIONS BELOW

The orders without opinion of the Court of Criminal Appeals of Alabama affirming the denial of Respondent Sturdivant's petition for a writ of error coram nobis and denying rehearing are not as yet reported but will be reported as follows:

Sturdivant v. State, ___ So.2d ___ (Cr.App.Ala., 1983)

A copy of the certification of the same is submitted as Appendix "A" to this petition.

The opinion of the Supreme Court of Alabama reversing the Court of Criminal Appeals' decision and orders in this case is not as yet reported but will be reported as follows:

Ex parte: Sturdivant, In re: Sturdivant v. State, ___ So.2d ___ (S.Ct. Ala., 1984)

A copy of the same is submitted as Appendix "B" to this petition.

The order of the Alabama Supreme Court denying rehearing but modifying its opinion is not as yet reported but will be reported as follows:

Ex parte: Sturdivant; In Re: Sturdivant v. State, ___ So.2d ___ (S.Ct. Ala., 1984)

A copy of the same is submitted as Appendix "C" to this Petition.

The order and opinion of the Court of Criminal Appeals of Alabama conforming its decision to that of the Alabama Supreme Court is not as yet reported but will be reported as follows:

Sturdivant v. State, ___ So.2d ___ (Cr.App.Ala., 1984)

A copy of the same is submitted as Appendix "D" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama denying rehearing in this case was issued on July 6, 1984, (Appendix "C", page 12) and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOVLED

The Alabama Supreme Court decided this case under Anders v. California (386 U.S. 738 [1967]), wherein this Honorable Court construed section one of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> "...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection to the laws...."

STATEMENT OF THE CASE

On May 17, 1983, the Respondent, Ernest J. Sturdivant, filed a petition for a writ of error coram nobis in the Circuit Court of Dallas County, Alabama, seeking a new trial.[1] The grounds alleged in the petition were as follows:

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1. The records of the Circuit Court of Dallas County show, the Alabama Supreme Court found (Appendix "B", page 3), and it is undisputed that on May 5, 1982, the Respondent was convicted of robbery in the second degree and sentenced to twenty years imprisonment.

1. His lawyer did not appeal his conviction,[2] no suggestion was made that there was any error to appeal.

2. He had an alibi witness.

3. His attorney refused to subpeona the alibi witness.

4. No pre-sentence report was made on his case.

5. He was denied Youthful Offender treatment.

6. He did not receive a transcript of the trial.

7. Although the Court granted a motion to suppress, the Respondent's attorney did not object to the introduction of evidence found in a search.

On the basis of these allegations he

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2. Literally: "...I was treated not to appeal as lawyer refused to fully investigate all areas of defense and to insert them in a timely and proper manner: Reece vs. Georgia, 100 L.Ed. 1955...." (R. p. 4)

prayed for either a new trial or a sentence reduction. (R.pp. 1-7)

New counsel was appointed for the Respondent, and a hearing was held on August 5, 1983. Following the hearing, the Court entered an order finding that the Respondent had not been deprived of the effective assistance of counsel and denying the writ. (R.p. 9)

Appeal was taken to the Court of Criminal Appeals of Alabama, which on November 29, 1983, affirmed the Circuit Court's judgment without opinion and, on January 10, 1984, denied rehearing also without opinion. (Sturdivant v. State, ___ So.2d ___ (Cr.App.Ala.,Nov. 29, 1983); Appendix "A", Pages 1-2).

The Supreme Court of Alabama granted Respondent Sturdivant a writ of certiorari. On May 11, 1984, the Alabama Supreme Court reversed the decision of

the Court of Criminal Appeals. The Alabama Supreme Court held that the Respondent's Attorney's not appealing the Respondent's conviction, even though it was based on his understanding of his client's intentions, constituted ineffective assistance of counsel. The Alabama Supreme Court ruled that under Anders v. California (386 U.S. 738 [1967]) the Respondent had been denied the effective assistance of counsel on appeal. The Court wrote in part:

> "In the case at bar, the requirements of Anders were not followed. Sturdivant's statement that he would "go and build his time" did not necessarily mean that he did not wish to contemporaneously proceed with the appeal; thus his counsel was not relieved of his duty to either appeal the conviction or to withdraw from the case after following the guidelines of Anders. Due to this inadvertent failure, Sturdivant was denied the procedure set forth in Anders

> and, therefore, the trial court should have granted Sturdivant's petition. It also follows that the Court of Criminal Appeals erred in affirming that denial...." (Appendix "B", pages 10-11)

The cause was remanded to the Court of Criminal Appeals "...with directions to allow petitioner [Sturdivant] an out of time appeal...."[3]. (Sturdivant v. State, ___ So.2d ___ (S.Ct.Ala., May 11, 1984); Appendix "B", page 11)

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3. The Alabama Supreme Court also wrote:

> "...[The Attorney] advised his client that, if he should succeed on appeal, he would probably be retried and could possibly be convicted of the more serious offense of robbery in the first degree...." (Appendix "B", page 5; emphasis supplied).

On rehearing both parties protested that nothing in the record supported or even suggested the underlined language in this passage. On rehearing the Alabama Supreme Court modified this passage to read. (Continued)

The State of Alabama applied for rehearing protesting the language discussed in footnote 3 above. More importantly, the State pointed out that the Court had reversed the traditional policy of placing the question of appeal in the convicted defendant and in effect placed on the lawyer the duty to appeal unless his client gave unequivocal contrary instructions. The State pointed out that in some cases success on appeal could in the long run work to the detriment of a convicted defendant. In

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Footnote 3 continued:

> "...[The Attorney] also advised his client to the effect that, if he should succeed on appeal, he would probably be retried and could possibly be convicted of the more serious offense of robbery in the first degree...." (Appendix "C", page 15; emphasis supplied).

This is likewise unsupported by the record. See Appendix "E", page 21.

addition, the State pointed out that the unconflicting evidence was that an appeal would have been frivolous and that the Respondent was, therefore, not prejudiced. Strickland v. Washington (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ [1984]) was specifically called to the Court's attention.[4] On July 6, 1984, the Alabama Supreme Court denied rehearing but modified its opinion slightly. See footnote 3, above.

On August 14, 1984, the Court of Criminal Appeals of Alabama conformed to the Alabama Supreme Court's decision and opinion. (Sturdivant v. State, ___ So.2d ___ [Cr.App.Ala., August 14, 1984]; Appendix "D", page 17).

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4. The Alabama Supreme Court issued its original opinion in this case on May 11, 1984. Strickland was issued May 14, 1984. At the time of the State's application for rehearing, counsel knew of Strickland from news reports but did not have access to the text of the opinion.

STATEMENT OF THE FACTS

Only the facts relating to the Respondent's claim of denial of effective counsel on appeal are directly relevent in this proceeding. However, the facts relating to the other claims in his original petition are useful in putting the relevent claim in context.

Honorable Edward W. Green, Jr., Attorney at Law, was originally appointed to represent the Respondent, but, when Mr. Green accepted an appointment as Chief Deputy District Attorney, Honorable Robert Blair, Attorney at Law, was appointed in Mr. Green's stead. (Tr. pp. 2,16-17 and 24)

The Respondent's alleged alibi witness was an individual who was with the Respondent on the day of the robbery from 7:00 a.m. until 3:00 p.m. (Tr. pp.

3-5) Both of his attorneys told the Respondent that, since the robbery occured at 7:00 or 8:00 p.m., this witness would provide no alibi for the time of the crime. (Tr. pp. 4 and 6-8) The Respondent insisted that the witness would provide an alibi, because when the Respondent and the witness separated at 3:00 p.m., the Respondent told the witness that he planned to go to Birmingham. (Tr. pp. 4-5 and 7-8) The lawyers told the Respondent that he needed to identify some of the people he claimed could place him in Birmingham at the time of the robbery. (Tr. pp. 8-10 and 22-23) To this end, the attorneys obtained the release the Respondent's automobile from impoundment. (Tr. pp. 8-9 and 22) But, the Respondent never did go to Birmingham. (Tr. pp. 9-10)

A pre-sentence-youthful offender report was ordered by the Court and filed by the Board of Pardons and Paroles prior to trial. (R.pp. 10-13 and Tr. pp. 13-14) The Respondent recalled attending his Youthful Offender hearing. (Tr. pp. 14-15)

No evidence was presented relative to the trial transcript.

The Respondent's attorneys filed a motion to suppress the pistol used in the robbery, which was found in the Respondent's automobile incident to his arrest about an hour after the robbery.[5] (Tr. pp. 2-3, 17, 24-25) A pre-trial

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5. This record is devoid of any evidence relating to the crime, the arrest, the search or the seizure, except for the pre-sentence-youthful offender report. (R.p. 11) This seems to suggest a legal search. See United States v. Ross, 456 U.S. 798, 72 L.Ed.2d 572, 102 S.Ct. 2127 (1982). The record does not suggest why this search was thought to be illegal.

hearing was held on the motion, but, since there was difficulty in getting witnesses to this hearing, the Circuit Judge did not enter a ruling. However, based on what he heard at this hearing, His Honor apparently had doubts about the search and seizure, which he expressed to Mr. Green (Tr. p. 18 and 21). Naturally, Mr. Green mentioned this to the Respondent. (Tr. pp. 18) However, by the time of trial, the State was able to produce additional witnesses, including the Respondent's accomplice, and bear its burden of proving a legal search. Thus Mr. Blair's objections to the evidence were overruled. (Tr. pp. 10-12 and 26)

Turning to appeal, it was undisputed that shortly after the conviction, Mr. Blair visited the Respondent. (Tr. pp. 5-6 and 27) At this time, the Respondent

expressed an interest in appeal. (Tr. pp. 5-6, 10 and 15-16) Mr. Blair, while fully aware of his duty to appeal if the Respondent so desired,[6] counseled against appeal. Mr. Blair advised the Respondent that there was nothing in the record to argue on an appeal and that an appeal would be frivolous. (Tr. p. 28)[7] In the only real conflict in the evidence in this case, the Respondent testified that Mr. Blair told him that, if his conviction was reversed on appeal, he would be retried and could possibly get more time.[8] (Tr. pp. 15-16) Mr. Blair

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6. Longmire v. State, 443 So.2d 1265 (S.Ct. Ala., 1982).

7. This was Mr. Blair's usual advise to his clients in such frivolous cases. (Tr. p. 32).

8. It is possible that the Respondent confused Mr. Blair's statements concerning an appeal with his discussion of certain pending charges. See Appendix "E", pages 28-29.

testified that he told the Respondent that in the event of a reversal on appeal, the case would probably be retried with the same result as the first trial. (Tr. p. 28) Mr. Blair met with the Respondent and talked with his family many times. (Tr. pp. 12-13 and 31) During this time the Respondent, "...indicated to ...[Mr. Blair] different feelings at different time[s]...." (Tr. p. 27) with regard to appeal. Finally, the Respondent advised Mr. Blair that "...he would go and build his time and get it over with..."[9]. (Tr. p. 28) In the context of their conversations, Mr. Blair understood this to mean that the

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9. The Appellant's choice of words indicates that his main interest in appeal was that it might have put off the time for the commencement of his sentence.

Respondent had decided not to appeal. (Tr. p. 28) About a week later, after the time for appeal had run, the Respondent called Mr. Blair to the jail and told him that he wanted to appeal after all. Mr. Blair advised the Respondent that the time for appeal had run. (Tr. p. 28)

At no point was it ever suggested that there was anything to argue in an appeal by the Respondent. In fact, the only evidence on the subject was that an appeal would have been frivolous. (Tr. pp. 28 and 31)

SUMMARY OF THE ARGUMENT

In Strickland v. Washington (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ [1984] this Honorable Court set the standards for the effective assistance of counsel at trial. Although there are

clear differences between trial and appeal, the differences are such that appellate advocacy which met the Strickland standards would necessarily be effective within the meaning of the Constitution. A determination of effective assistance of counsel under Strickland requires a two-fold determination: First, whether counsel made errors of such seriousness that he or she was not functioning "as counsel" and, second, whether there is a reasonable probability that, but for counsel's errors, there would have been a disposition more favorable to the accused. Judged by these standards the conduct of the Respondent's attorney in this case was neither deficient nor prejudicial.

In forming a professional judgment that an appeal would be frivolous, communicating his opinion to his client and counseling against appeal, the Respondent's attorney did exactly what would have been demanded of a retained attorney. Compare Jones v. Barnes, ___ U.S. ___, 77 L.Ed.2d 987, 103 S.Ct. ___ (1983). In light of Alabama law (e.g. Longmire v. State, 443 So.2d 1265 [S.Ct. Ala., 1982]), the lower state court rulings represent findings that the Respondent made and communicated to his lawyer a decision not to appeal. The Alabama Supreme Court in effect held that under Anders v. California (386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 [1967]) the attorney had a duty to appeal automatically. In so holding, the Alabama Supreme Court erroneously reversed the

respective roles of attorney and client in the taking of appeals, ruled contrary to the decisions of this Honorable Court (Jones v. Barnes, above, 77 L.Ed.2d 987, 993), created a situation where convicted person's rights could be seriously prejudiced, and rejected a ninety (90) year line of authority by this Honorable Court. McKane v. Durston, 153 U.S. 684, 38 L.Ed.2d 867, 14 S.Ct. 913 (1894); Jones v. Barnes, above. It is the client who has the right to decide whether or not to appeal and the client who must communicate his decision to his attorney. Judged by this standard, the Respondent's attorney did not err.

The undisputed evidence in this case is that any appeal would have been frivolous. Not appealing a frivolous

case is manifestly not prejudicial within the meaning of Strickland v. Washington, above. This contradicts nothing in Anders v. California, above, since the appeal at issue in that case was expressly found to be non-frivolous. Anders v. California, 386 U.S. 738, 741, 743, 18 L.Ed.2d 493, 496, 498).

ARGUMENT

REASON FOR GRANTING THE WRIT: CONFLICT WITH THIS HONORABLE COURT'S DECISION IN STRICKLAND V. WASHINGTON (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. [1984])

A.

THE APPLICABILITY OF STRICKLAND V. WASHINGTON

In Strickland v. Washington (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ [1984]) this Honorable Court set the standards for judging effective assistance of counsel at trial. (80

L.Ed.2d 674, 693) The first issue in this case is whether the Strickland standards apply to counsel on appeal.

There are fundamental differences in trial and appeal. The right to a trial is a fundamental constitutional right, and the right to trial counsel is expressly guaranteed by Sixth Amendment, made applicable to the states by the Fourteenth Amendment. This Honorable Court outlined these differences in Ross v. Moffitt (417 U.S. 600, 41 L.Ed.2d 341, 94 S.Ct. 2437 [1974]), with these words:

> "...At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel is fundamental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt...

"By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below....

"This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. McKane v. Durston, 153 U.S. 684, 38 L.Ed.867, 14 S.Ct. 913 (1894)...." (417 U.S. 600, 610-611, 41 L.Ed.2d 341, 351; emphasis supplied).

The Constitutional basis of appeal has been stated and restated many times by this Court. Just last year this Honorable Court restated that basis with these words:

"...There is, of course, no constitutional right to an appeal, but in Griffin v.

> Illinois, 351 U.S. 12, 18, 100 L.Ed.891, 76 S.Ct. 585, 55 A.L.R. 2d 1055 (1956), and Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963), the Court held that if an appeal is open to those who can pay for it, an appeal must be provided for an indigent...." (Jones v. Barnes, ___ U.S. ___, 77 L.Ed. 987,993, 103 S.Ct. ___ [1983])

See also Estelle v. Dorrough, 420 U.S. 534, 43 L.Ed.2d 377, 95 S.Ct. 1173 (1974); Wainwright v. Torna, 455 U.S. 586, 71 L.Ed.2d 475, 102 S.Ct. 1300 (1982), and many others.

Thus, an accused's trial rights are based on his fundamental right to be presumed innocent until the contrary is proven in a fair trial. But, as this Court has recognized, appeal is nearly the reverse of the trial situation. On appeal by a convict, the presumption is that he has been proven guilty beyond a

reasonable doubt in a fair and proper trial. To prevail at trial, the accused need do nothing; if the government fails to carry its burden, the accused is due to be acquitted. On appeal of a conviction, the roles are reversed. The convict carries the burden of showing error in the face of a presumption of correctness, and it is the government which need do nothing. See, for example, Hicks v. State, 437 So.2d 1344 (Cr.App. Ala., 1982);[10] Aff'd 437 So.2d 1346 (S.Ct. Ala., 1983).

Since the right to trial counsel is fundamental under the Sixth Amendment,

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10. Due to administrative error and the inexperience of the originally designated appellate prosecutor, the State filed a letter "declining to file a brief." This is recognized as the Alabama Attorney General's way of "confessing error." Yet, the Court of Criminal Appeals affirmed.

while the right to counsel on appeal is derived from state law and is of constitutional proportions only to the extent that the states may not practice invidious discrimination it would appear that the standards of effective assistance of counsel on appeal may be somewhat lower than the standards for trial counsel. Arguably, the standards for counsel on appeal ought to be set by uniformly applicable state law.[11]. However, it can not be argued that performance by appellate counsel which passes muster under the Sixth Amendment

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11. "...This procedure will assure penniless defendants the same rights and opportunities on appeal - as nearly as is practicable - as are enjoyed by those in a similar situation but who are able to afford the retention of private counsel...." Anders v. California, 386 U.S. 738, 745, 18 L.Ed.2d 493, 499, 87 S.Ct. 1396 (1967).

standards for trial counsel, would miss the mark of effective assistance of counsel on appeal.

The Sixth Amendment standards for effective assistance of counsel, as stated above, were set out in Strickland v. Washington (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ [1984]). Speaking for the Court, Justice O'Connor wrote:

> "...A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense...." (80 L.Ed.2d 674, 693).

Justice O'Connor expanded on these components as follows:

On the standard of performance for counsel:

> "...Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable... Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." (80 L.Ed.2d 674, 694; emphasis supplied)

> "...[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judg-

ment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance...." (80 L.Ed.2d 674, 695)

On prejudice:

"...The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different...." (80 L.Ed.2d 674, 698)

On both:

"...Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one...." (80 L.Ed.2d 674, 699)

Applying the first component to counsel on appeal involves simply determining whether the defendant has shown that counsel's actions or omissions were in keeping with what is expected of appellate counsel in general. Needless to say such expectations are the same in indigent and non-indigent appeals. e.g. Anders v. California, 386 U.S. 783, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967) (See the language quoted at note 11, above); Jones v. Barnes, ___ U.S. ___, 77 L.Ed.2d 987, 103 S.Ct. ___ (1983) Applying the second component involves merely determining whether there is a reasonable probability that, but for the alleged acts or omissions, the result would have been more favorable to the accused. In the case of not taking an appeal, this would mean, at a minimum, a showing that

there is a reasonable probability that the appeal would have resulted in the setting aside of the conviction or the sentence or some portion thereof.

Although Strickland emphasizes that the two components are independent, in this case, this Respondent was not deprived of effective assistance of counsel under either component.

B.

COUNSEL'S PERFORMANCE WAS NOT DEFICIENT.

In judging counsel's performance in this case it is necessary first to identify what counsel did and what he did not do.

There is no claim in this case that counsel failed to confer with his client, failed to advise his client concerning

appeal, and there is no evidence that the attorney refused to appeal his client's conviction. If the Respondent's attorney's performance was deficient in any fashion it must be in regard to three acts by the attorney:

1. He formed a professional judgment that there was nothing to argue on appeal and that an appeal would be frivolous.

2. He communicated this judgment to his client and recommended that no appeal be taken.

3. He did not appeal because he understood that his client had decided not to appeal.

Obviously, forming a professional judgment about what can be and should be argued in an appeal is one of the most

important tasks of appellate counsel. See generally Jones v. Barnes, ___ U.S. ___, 77 L.Ed.2d 987, 103 S.Ct. ___ (1983). In carrying out this task, the Respondent's attorney concluded that an appeal would be frivolous. No one questions the accuracy of counsel's judgment. In fact, the Respondent's wording of his claim in his coram nobis petition (See footnote 2, page 5), suggests that he concurred in the attorney's judgment but thought that the attorney should have gone out and "investigat[ed]" in an effort to find something to "insert" in the record. There is no suggestion in this record that such an investigation would have turned up anything nor, if it had, how it could have been incorporated in the record. Obviously, counsel's performance

in this regard was not only not deficient but was in full accord with his professional responsibilities.

There would be little point in an attorney's forming a professional judgment and then keeping it to himself. Obviously, the judgment must be communicated to the client along with a recommendation. Given that the Respondent's attorney had formed a professional judgment that an appeal would be frivolous, it is difficult to see how any issue can be made of his advice that no appeal be taken. Certainly, a paying client would have expected such advice.

We now come to the crux of counsel's performance: Did the attorney act correctly in light of his client's statement that "...he would go and build his time and get it over with...." (Tr.p.

28) The lower state courts treated this as an issue of fact: Did the attorney correctly understand the statement to be a communication of a decision not to appeal? It was certainly reasonable for the attorney to so understand the statement in light of his previous conversations with his client. The fact that the Respondent called the attorney to the jail after the time for appeal had run and told him to appeal, tends to support the attorney's understanding. Why call the attorney to the jail for new instructions, unless the client had changed his mind. The findings and orders of the Circuit Court and the Court of Criminal Appeals represent, in light of Alabama law,[12] findings that during

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12. Longmire v. State, 443 So.2d 1265 (S.Ct. Ala., 1982)

the time when appeal was possible, the Respondent made and communicated to his lawyer a decision not to appeal.

The Alabama Supreme Court avoided these findings of fact by holding that Anders v. California (386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967]) required an attorney to appeal automatically unless the client clearly and affirmatively forbids appeal. Such an interpretation of Anders is, of course, outlandish. That case did not involve the taking of appeals at all but the duties of appellate counsel once the decision to appeal has been made and implemented. More significantly, the Alabama Supreme Court has ruled contrary to the constitutional policy articulated

by this Honorable Court[13] and completely reversed the respective roles of attorneys and clients in the taking of appeals. Traditionally the client decided whether or not to appeal, while the attorney could decline to handle the appeal, if he was retained, or ask to withdraw, if he was appointed. See Anders, 386 U.S. 738, 744, 18 L.Ed.2d 493, 498. Under the Alabama Supreme Court's reading of the Federal Constitution, appeal follows automatically upon conviction and it is the client who must by clear and affirmative action stop the appellate process. This is significant,

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13. "...It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal...." (Jones v. Barnes, 77 L.Ed.2d 987, 993; emphasis supplied)

because, while most indigent convicts view appeal as a "can't lose" proposition, such is not always the case. For example, a favorable judgment and sentence based on a guilty plea can be wiped out on appeal, reinstating the original charges and sentence exposure.[14]. On retrial after a reversal

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14. "...If the state court decides to allow withdrawal of the plea, the petitioner will, of course, plead anew to the orginal charge on two felony counts...." Santobello v. New York, 404 U.S. 257, 263, 30 L.Ed. 427, 433, 92 S.Ct. 495 (1971).

See also, Clark v. State, 294 Ala. 485, 318 So.2d 805 (1974) cert. den. 423 U.S. 937, 46 L.Ed.2d 70, 96 S.Ct. 298 (1975).

This is a real problem. For example, in Alston v. State (___ So.2d ___ [Cr.App. Ala., June 12, 1984]), the convict appealed from a conviction based on a plea bargain. The Court of Appeals reversed. While the State's application for rehearing was pending, the successful Appellant moved to dismiss the appeal and to reinstate the original conviction and (Continued)

on appeal, a convicted person can receive a harsher sentence from a judge [15] or jury.[16] A favorable erroneous ruling by a trial judge might be overturned on appeal, even though the state could not

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Footnote 14 continued:

sentence. Apparently the convict appealed simply to delay the commencement of his sentence only to discover that his successful, if ill-advised, appeal had the effect of wiping out a rather favorable judgment and sentence.

15. "...We hold that after retrial and conviction following a defendant's successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings...." Wasman v. United States, ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___, 52 U.S. L. Wk. 5063, 5066-5067 (1984).

16. Chaffin v. Stenchcomb, 412 U.S. 17, 36 L.Ed.2d 714, 93 S.Ct. 1977 (1973)

have appealed.[17] A convict appellant's sentence might be stayed pending appeal,[18] prolonging the disruption of his life. In addition, in the case of non-indigent convicted persons, appeal is a costly process for which they must pay. For all of these reasons, the decision of whether or not to appeal ought to be, as this Honorable Court has stated, in the convicted person. Finally, as a matter

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17. See, Milner v. State, 414 So.2d 133 (Cr.App.Ala., 1981); cert. quash. Accused bargained his plea, obtaining an agreement from the prosecutor to partially waive the habitual offender provisions. The trial court approved and sentenced the defendant on that basis. On appeal by the convict, the Court held: Niether the prosecutor nor the judge could waive the habitual offender provisions, case reversed and remanded for trial.

18. Alabama v. Gamble, 509 F.2d 95 (5th Cir. 1975); cert. den. 423 U.S. 924, 46 L.Ed.2d 250, 96 S.Ct. 267. Convict-Appellant had no right to credit on his sentence for the time he was detained in the county jail pending appeal.

of simple logic, if, as this Honorable Court has consistently held from 1894[19] through last year,[20] there is no constitutional right to appeal, how could there be a right to an automatic appeal.

The attorney's duties in a criminal appeal are limited to advising the client concerning the appeal and implementing the client's decision once it is made. It is the client's right to decide whether or not to appeal and the client's duty to make that decision and to communicate it to his attorney within the time allowed for taking appeal. The attorney in this case advised his client concerning appeal and stood ready to

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19. McKane v. Durston, 153 U.S. 684, 38 L.Ed. 867, 14 S.Ct. 913 (1894)

20. Jones v. Barnes, ___ U.S. ___, 77 L.Ed.2d 987, 993, 103 S.Ct. ___ (1983)

perfect the appeal should the client reject his advice. If the attorney did not appeal it was because the client communicated a decision not to appeal. If there was any dereliction here, it was not that of the attorney.

Unless the Alabame Supreme Court is correct in ruling that an automatic appeal is mandated in every criminal case by the U.S. Constitution, this attorney's performance met that expected of appellate counsel in criminal cases.

C.

THE ATTORNEY'S OMISSION DID NOT PREJUDICE THE RESPONDENT

Under the Strickland standards for counsel at trial, there can be no finding of ineffective assistance of counsel unless it appears that there is a reason-

able probability that but for counsel's act or omission, the result would have been more favorable to the accused. Applying this standard to an attorney's not taking appeal, the issue would be: Had an appeal been taken, is there a reasonable probability that the convicted person would have received a new trial, a reduction in sentence or otherwise benefited from the appeal?

The undisputed evidence in this case is that any appeal would have been fivolous and there was nothing to even argue in an appeal. At the coram nobis hearing there was not even a claim to the contrary. A more obvious example of a non-prejudicial omission by counsel than the failure to take a frivolous appeal cannot be imagined.

Of course, it could be argued that appellate courts, being human institutions, sometimes erroneously reverse even frivolous cases. However, Strickland holds that such possibilities do not enter the prejudice formula. Justice O'Connor wrote:

> "...An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, nullification, and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency...." (Strickland v. Washington, 80 L.Ed.2d 674, 698)

Thus, in judging prejudice from an attorney's not appealing, it must be presumed that the appellate courts would have proceeded in a normal, proper fashion and rejected a frivolous appeal.

Finally, it must be observed that nothing argued here contradicts anything in Anders v. California (386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 [1967]). In Anders the Court expressly pointed out that the appeal at issue there would not have been frivolous. The Court further found a probable violation at trial of the rule of Griffin v. California (380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 [1965]). Anders, 386 U.S. 738, 741, 743, 18 L.Ed.2d 493, 496, 498. Here, however, there is no suggestion of any arguable error. As the attorney advised his client, an appeal would have had no

effect on his case.

Under the Strickland standard, it affirmatively appears that counsel's omission did not prejudice the Respondent.

CONCLUSION

In conclusion, the Petitioner State respectfully submits that the decision and opinion of the Alabama Supreme Court in this case conflicts with the prior decisions of this Honorable Court on the respective rights and duties of convicted persons and their attorneys in the taking of appeals and on the standards for the effective assistance of counsel under the United States Constitution. For these reasons, the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decisions and

opinions of the Honorable Appellate Courts of Alabama and on such review will reverse the decisions of said Courts to the extent that the same hold that the conduct of the attorney in this case violated the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this ___ day of August, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys* for Earnest James Sturdivant, Respondent, and a courtesy copy on his former attorney** by mailing same to them, first class postage prepaid and addressed as follows:

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